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No. 86-922

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO & VINCENT F. SERVELLO,

Petitioners,

v.

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP. & STEPHEN R. COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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February 12, 1987

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Petitioners-attorneys respectfully file this brief in reply to the brief of respondents filed in opposition to the petition for a writ of certiorari to review the order of a motion panel of the Court of Appeals for the Second Circuit, dated September 2, 1986, dismissing petitioners-attorneys' appeal from a second final judgment entered in this case on March 7, 1986.

STATEMENT

Respondents, in their brief in opposition, attempt to obscure the denial of petitioners-attorneys' right to an appeal in this case by emphasizing, as proof of a purported lack of innocence on petitioners-attorneys' part, the very allegations of "bad faith" litigation concerning which petitioners-attorneys sought—and were denied—appellate review in the Court of Appeals. Respondents are aided in this effort by the decision of the Second Circuit panel in this case, 794 F.2d at 850 which, while it emphatically declares that the issue of sanctions is not before it, nonetheless affirms, without explanation, the entry of an injunction against plaintiffs and petitioners-attorneys for bad faith litigation, an injunction which is itself part of the sanction awarded against petitioners-attorneys by the District Court. In other words, petitioners-attorneys have been found liable for bad faith litigation by the Court of Appeals even though the issue has ostensibly never been passed upon by that body.

The District Court itself, on the other hand, never held that the present action was commenced in bad faith. On the contrary, it held that plaintiffs' opposition to respondents' motion for summary judgment became objectionable only after the Court of Appeals, in a companion case, 762 F.2d 185 (2d Cir. 1985), had affirmed the dismissal of plaintiff Edward Beagan's claims on *res judicata* grounds.[1]

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1. The District Court held that opposition to respondents' summary judgment motion was unjustified despite the fact that the Court of Appeals in the *Beagan* case had made it plain that only Beagan, as a "privy" of Teltronics, was bound by *res judicata*. ("We take care to point out that we hold only that Beagan . . . is bound by the adverse decisions as to the cause of action asserted in the previous suits"). 762 F.2d at 193.

Hence the impression that respondents are now attempting to create that the instant case is only the "last gasp" in a "protracted litigation" involving the same "cause of action" espoused in prior actions, including bankruptcy proceedings, is entirely and deliberately false and misleading.

This is in fact the first time the plaintiff-shareholders in this case have come to court seeking damages both for themselves and for the other defrauded Teltronics' shareholders. Indeed, the District Court explicitly conceded that *res judicata* was not an issue in the case. 623 F.Supp. at 189. The record demonstrates that plaintiffs, as shareholders with individual losses, have sued once and only once for the harm they suffered at respondents' hands and the facts presented in the litigation—never denied by respondents—fully support the allegations in their complaint.[2] Hence, no evidence of bad faith exists factually or legally.

Respondents' further contention that, in attempting to appeal the dismissal of their case and the entry of an injunction against them, plaintiffs and their attorneys were somehow attempting to institute "simultaneous proceedings" in the District Court and the Court of Appeals is

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2. The complaint charges respondents with the intentional destruction of plaintiffs' stock interest in Teltronics as part of an illegal takeover scheme which included bribery and the manipulation of the national securities markets in violation of the RICO statute and federal securities and antitrust law. The complaint charges that respondent Ericsson was involved in similar schemes in connection with the debt takeovers of its Miami, Boston and Philadelphia subsidiaries. Recent press reports serve to confirm plaintiffs' allegations of a "pattern" of such illegal activity. See Appendices A through D.

patently ludicrous. Plaintiffs' appeal from the District Court's injunction was "as of right" and respondents' attempt to dismiss that appeal was denied by the Court of Appeals. Prior to the denial of their motion, however, respondents exerted every effort to prevent an appeal by plaintiffs to the Court of Appeals, including requesting the District Court immediately to enter a judgment for $70,000 directly against petitioners-attorneys on grossly inflated papers, attempting to intimidate plaintiffs' lawyers with the prospect of immediate execution of that second "judgment", and by simultaneously requesting the lower court to direct the filing of a supersedeas bond in the amount of 110% of the proposed $70,000 "judgment" as a condition precedent to plaintiffs taking their appeal.

ARGUMENT

I.

ENTRY OF THE SECOND FINAL JUDGMENT WAS NOT COLLATERAL TO THE MERITS OF THE CASE

The issue of the award of sanctions against petitioners-attorneys is clearly not "collateral" to the substantive action, as respondents contend. The award of sanctions (and the entry of an injunction against plaintiffs and their attorneys) was appealed by plaintiffs in connection with the first "final" judgment entered in the case. Jurisdiction over the case was immediately transferred to the Court of Appeals upon the filing of a notice of appeal "with respect to *any matters* involved in the appeal." *G & M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir. 1973), (quoting 9 J. Moore, *Moore's Federal Practice*, § 203.11 (2d

ed. 1986) (emphasis added). See also, *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). Respondents' motion to dismiss the appeal on the ground that it was prematurely filed was, as noted, denied by the court.[3]

It is self-evident that the considerations that were necessary to sustain the second final judgment, are the same considerations used to evaluate the appeal from the first final judgment, *i.e.*, the question of whether and to what extent the litigation was conducted in bad faith. Accordingly, the District Court clearly had no jurisdiction to consider the amount of sanctions to be awarded after notice of appeal from the first final judgment—which involved the sanctions issue—had been served and filed.

The cases cited by respondents on page 6, footnote 3, of their brief in opposition, all concern or follow cases concerning fee awards under 42 U.S.C. Section 1988 or 42 U.S.C. Section 2000e-5(k). In these fee requests, the merits of the underlying actions were not in question. That is not the case here. Here the validity and amount of the award for alleged bad faith are inextricably intertwined. In *Wright* v. *Jackson*, 522 F.2d 955 (4th Cir. 1975), for example, the Fourth Circuit held that "insofar as a court's measure of a party's obstinacy depends on the nature of the case, it must make that assessment while the merits are before it, either prior to an appeal or on remand after they have been settled." 522 F.2d at 958. That is the rule which should have been applied here. See also, *Nichol* v.

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3. The *G & M* case details three exceptions to the prohibition of district court jurisdiction during appeal. These are (1) orders in aid of appeal; (2) corrections of clerical errors; and (3) orders in aid of execution of a judgment, 488 F.2d at 746. None of these exceptions is present here.

Gulf Fleet Supply Vessels, Inc., 743 F.2d 298 (5th Cir. 1984) (once an appeal is taken from a judgment which determines an entire action, the District Court loses power to take any further action in the case); *Main Line Fed. Savings & Loan Ass'n* v. *Tri-Kell, Inc.*, 721 F.2d 904 (3rd Cir. 1983) (once an appeal is taken, the lower court retains only such jurisdiction as is necessary to aid the higher court in consideration of the appeal); see also, 9 J. Moore, *Moore's Federal Practice*, § 203.11 (2d ed. 1986).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX A

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BPA

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Perhaps buying prostitutes for potential customers is not an uncommon big business practice, but it's big news when you get caught, as LM Ericsson Telephone Co. found out last week. The Stockholm press had a field day with a story alleging that Ericsson provided hookers at a party for Arthit Kamlang-ek, military Supreme Commander and chairman of the board of the PTT of Thailand—a key Far East Ericsson customer. And the kicker is that while the party was going on, Kamlang-ek was missing a military coup back home. Although Ericsson denied any direct involvement, it acknowledged that over-zealous Ericsson salesmen in town from Thailand for the general's visit might have "indirectly involved" the company. A spokesman said Ericsson was "very embarrassed" by the episode. "If our money was used, it was without our knowledge, but it is still our responsibility. It is far from our way of doing business. We must see that every part of our business is clean."

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ERICSSON RUNS INTO TROUBLE IN COLUMBIA

JOHN WILLIAMSON, INTERNATIONAL EDITOR

Sweden's LM Ericsson has run into problems in Columbia in its efforts to secure an $8 million contract to supply AXE digital central offices. Following local reports of irregularities and bribery, the ratification of the contract has been postponed, pending an official inquiry.

A senior LM Ericsson executive in Stockholm said the company would appeal against the postponement, and added, "we know we will come out of this without problems."

App. 2

APPENDIX B

TELEPHONY MAG. 12/29/86, p. 16

APPENDIX C

THE WALL STREET JOURNAL

1-22-87 p. 34

Venezuela Official Is Asked To Investigate Ericsson

Special to THE WALL STREET JOURNAL

CARACAS, Venezuela—The president of Venezuela's congress officially requested that the attorney general investigate allegations that L.M. Ericsson Telefon AB bribed Venezuelan officials.

In Stockholm, a spokesman for the Swedish telecommunications company rejected the allegations as "completely groundless." He cited a company policy that forbids the payment of bribes and said Ericsson welcomes the investigation.

A Venezuelan congressional committee already is studying the bribery charges in connection with a pending $186.6 million contract for telephone equipment that was awarded by the state telephone company, Cantv, last year to Ericsson, Nippon Electric Co. of Japan and Siemens AG of West Germany.

The charges arise from investigations by the Bogota, Colombia, newspaper El Tiempo since November regarding $3.8 million in alleged bribes paid to Colombian and Venezuelan officials. El Tiempo reported that Ericsson paid nearly $2 million to an unidentified high-level Venezuelan politician between 1978 and 1980.

The congress's president, Reinaldo Leandro Mora, said: "We have urgently requested the attorney general to open an exhaustive and detailed investigation of the activities in Venezuela of Ericsson that could lead to the establishment of legal responsibilities."

APPENDIX D

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... 50 CENTS

Secrets Police

Neutral Nations Guard American Technology To Gain Import Rights

U.S. Lets Sweden and Others Get Export Licenses Fast If Leaks to Soviets Stop

Ericsson Negotiates a Bargain

By EDUARDO LACHICA
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – Swedish industrialist Peter Wallenberg acted quickly to minimize the damage after the U.S. charged two of his multinational companies with illegally transferring U.S. technology to the Soviet bloc.

He retained former Secretary of State Henry Kissinger and Edward Bennett Williams, the noted criminal lawyer, to defend his interests. His companies, L.M. Ericsson AB and ASEA AB, stood to lose millions of dollars of business if the U.S. government made it harder for them to import American products for their manufacturing operations around the world.

He also lobbied hard in both Stockholm and Washington for a bargain that the U.S. and Sweden eventually struck – closer Swedish vigilance against illegal diversion of U.S. technology, in exchange for continued access to U.S. high-technology components.

The U.S.-Swedish accord, which was negotiated quietly in 1981 and 1982, has become the model for similar arrangements with some other neutral countries – Austria, Switzerland and, more recently, Singapore. India may eventually follow suit. These unwritten agreements, which require neutral countries to do a better job of policing their trade, are designed to make it harder for the Soviets to circumvent curbs on the transfer of U.S. technology that has military applications.

How It Works

"This is one of the great untold stories of our times – how the need for U.S. technology is driving neutral countries to cooperate with us," says Paul Freedenberg, the assistant secretary of commerce for trade administration.

(The U.S. also will ask Allies to urge neutral nations to keep strategic goods out of Soviet hands. See article on page 20)

The bargain certainly has worked well for both the U.S. and Sweden. A cabinet ordinance that Sweden put into effect last June extends U.S. controls to American products imported by Swedish nationals – and by definition to a lot of locally produced goods as well if they have components of U.S. origin.

As a reward for Swedish cooperation, U.S. export-licensers treat Ericsson and ASEA as generously as they do importers from Allied countries, with which the U.S. has formal agreements on export controls. That is an invaluable privilege. Getting U.S. export licenses on time can mean the difference between winning or losing an order for, say, a telephone switching system or factory automation layout that needs an IBM computer.

Bloc Trades

As a consequence, the U.S. has been able to pull Sweden deeper into its economic sphere and away from the Soviet Union. Since 1981, Sweden's investments in the U.S. have grown 69% and its yearly exports to the U.S. have more than doubled to $4.3 billion. In 1985 the U.S. surpassed West Germany as a buyer of Swedish goods and became Sweden's largest overseas market.

The new business climate partly reflects changes that have taken place since the Justice Department in 1981 charged that Datasaab Contracting AB had violated U.S. export-control laws by sending the Soviets $3.1 million in U.S. computers and software that could permit tracking of military as well as civilian aircraft. The violation would have made Datasaab, a computer-software company later absorbed by

Secrets Police: Neutral Countries Agree to Guard U.S. Technology

Mr. Wallenberg's L.M. Ericsson, liable for criminal prosecution in the U.S.; potential penalties included fines of up to five times the value of the U.S. products involved and—the most severe of all penalties for Ericsson—denial of subsequent U.S. high-tech products.

Shortly after the Datasaab case was brought, the U.S. charged that ASEA, a Wallenberg heavy-machinery and electrical manufacturer, had illegally shipped nine computers to the Soviet Union and Czechoslovakia during the two preceding years.

Appeal to Commerce Chief

The only thing Mr. Wallenberg says about these cases is that "it took a long time to settle them." From 1981 to 1985 he made frequent trips to Washington, often with ASEA President Percy Barnevik. At a meeting with Commerce Secretary Malcolm Baldrige in 1982, he made a strong plea for his companies and vowed that they would handle their trade more scrupulously. Mr. Baldrige doesn't want to talk about his dealings with Mr. Wallenberg or his role in winning tougher technology-policing procedures from Sweden and some other neutral countries. "The less said, the better," the commerce chief remarks.

It is clear, though, that Mr. Wallenberg began a two-track effort to protect his companies' ability to ship products using advanced American technology. He worked hard to soften penalties against his companies and began an effort to convince the Swedish government that helping the U.S. police curbs on technology exports was in Sweden's interest.

The U.S. was anxious to close Sweden as a conduit for technology smuggling. In

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Continued From First Page

1981, Defense Secretary Caspar Weinberger offered Sweden the blueprints of a state-of-the-art General Electric Co. jet engine and other aerospace technology from Lear Siegler Inc., Teledyne Inc. and Honeywell Inc. if the Swedes would tighten their export controls. Sweden badly needed this equipment for the development of its new fighter-bomber, the JAS 39 Gripen, and eventually Washington and Stockholm reached an agreement.

In Sweden, Mr. Wallenberg worked to convince other businessmen that their interest, too, lay in cooperating with the U.S. When two Pentagon officials in charge of export-control policy, Richard Perle and Stephen Bryen, were in Sweden in 1982, Mr. Wallenberg invited them to his house to address a group of business leaders over dinner. According to Mr. Bryen's account, Mr. Perle was very direct about the U.S. desire to stop leaks of U.S. technology through Sweden, telling the businessmen: "We have a serious problem—serious enough to make us very tough even with a country like Sweden, which has been a good friend."

On his many trips to Washington, Mr. Wallenberg, a pro-West conservative, was fighting what he thought to be an anti-Swedish bias. He bristles at what he sees as an American notion of Swedes as self-indulgent socialists and welfare-staters. "Why, 90% of the Swedish GNP is produced by the private sector," he says. He retained Mr. Kissinger to advise Ericsson and ASEA on Washington policy.

Mr. Bryen says an understanding was first struck with Prime Minister Thorbjorn Falldin's conservative government in 1981-82. The Falldin government was shortly afterward replaced by that of the late Olof Palme and his Social Democrats, who, despite initial reluctance, subsequently adopted the Falldin deal.

But the Social Democrats began cooperating with the U.S. long before the cabinet adopted an export-control ordinance last year. In November 1983 Swedish customs, acting on the request of the U.S., stopped three containers of diverted U.S. computer parts from leaving the free port of Helsingborg for a Soviet destination—despite the lack of clear-cut laws to justify that action.

In April 1984 Mr. Williams, the lawyer Mr. Wallenberg had retained to represent Ericsson, won a favorable settlement for the firm. Ericsson agreed to pay a $3.1 million fine, the stiffest ever levied against a company for export-control violations; but Ericsson avoided a Commerce Department denial of export privileges, a penalty that usually accompanies infractions of this kind. In a U.S. court hearing, Mr. Williams had argued that export denial would have been a "lethal, devastating blow to a company that relies so heavily on its ability to do business in the U.S."

Moreover, the settlement averted a punitive breach-of-contract suit by the Soviets. It recognized Ericsson's right to complete some of its work for the Soviet air-traffic system, and the company thus remained eligible to claim a large part of the $75 million that the Soviets had offered to pay for the system.

ASEA also got off light. The Commerce Department fined it $440,000 in May 1985 but didn't disturb its export privileges. The ASEA executive responsible for selling the computers in violation of U.S. laws was convicted of tax evasion in Sweden, but not of technology piracy.

Out of all this emerged the Pentagon's plan to recruit neutral countries as unofficial associates in policing technology transfers. As Mr. Bryen describes it, the plan has three stages.

First, get the neutral countries to protect U.S. technology that they import for their own use. All the European neutral nations and most major Asian buyers of U.S. technology now unhesitatingly do this.

Second, get them to prevent sensitive U.S. products passing through their free ports, duty-free zones and bonded warehouses from being illegally diverted by third parties. Switzerland and Sweden introduced tougher in-transit restrictions early last year. Austria has promised to adopt similar rules in a few months.

Third, talk these neutrals into denying the Soviet bloc high-tech products that they manufacture themselves. This is a tougher request for the neutral nations to swallow, but Mr. Bryen asserts that the U.S. has had "good success" even in this matter. "We have persuaded them not to ship lasers, computers, aircraft parts and other stuff to the Soviets," he says.

The Wallenberg companies are pulling out of Soviet-bloc trade, although they say they are doing so mainly for economic reasons. "It's a lackluster market," says Lars Thunnell, ASEA's executive vice president. "Our business with them has been declining over the last few years."

Franklin Forsberg, the U.S. ambassador to Stockholm when the export-control arrangements were negotiated, says Mr. Wallenberg is simply following the wisdom of his late father, Marcus Wallenberg, the noted Swedish financier and industrialist. "Marcus," he says, "knew that a country with only eight million people and a highly developed industry could only find growth in export markets like the U.S."